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No. 93-1124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND; VIETNAM VETERANS OF AMERICA, ARKANSAS STATE CHAPTER; MOTHERS AIR WATCH,

Petitioners,

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, Director; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CAROL BROWNER, Administrator; VERTAC SITE CONTRACTORS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT VERTAC SITE CONTRACTORS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Vertac Site Contractors operates a hazardous waste incinerator under contract with the United States Environmental Protection Agency ("EPA") at the Vertac Superfund Site in Jacksonville, Arkansas, incinerating abandoned barrels of hazardous waste, some contaminated with low levels of dioxin. The EPA selected incineration as the removal action at the Vertac Site under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9604. The question presented is whether Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), bars citizen suits brought pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and other bases, that challenge and seek to enjoin an ongoing cleanup action EPA selects as necessary to protect human health and the environment from an imminent and substantial endangerment.

RULE 29.1 LISTING

The parent company of Morrison Knudsen Corporation (an Ohio corporation) is Morrison Knudsen Corporation (a Delaware corporation). The subsidiaries of Morrison Knudsen Corporation (an Ohio corporation), other than wholly-owned subsidiaries, are data-Cache Corporation, MK-CICAL Holding Company, Inc., Texas TGV Corporation, Construcciones Y Servicios Especializados S.A. de C.V., Metrovias, S.A., MK-Intertec Limited, Morrison Knudsen Rail Systems of Argentina, S.A., and Talleres Sudamericanos S.A.

MRK Incineration Company has no parent companies or nonwholly owned subsidiaries to list.

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RESPONDENT VERTAC SITE CONTRACTORS' BRIEF IN OPPOSITION

The respondent, Vertac Site Contractors ("VSC"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case reported at 999 F.2d 1212 (1993).

STATEMENT OF THE CASE

Petitioners instigated this action to enjoin the incineration of thousands of leaking and deteriorating drums of hazardous waste at the Vertac Superfund Site in Jacksonville, Arkansas. These wastes, some of which contained low levels of dioxin, had been abandoned by the former operator at the site, and in their unremediated condition presented one of the most serious threats to human health and the environment in the entire country. *See* 40 C.F.R. pt. 300 App. B (1992) (listed on the National Priorities List as the nation's eighteenth worst site). In response to this imminent and substantial endangerment, EPA selected incineration as the appropriate initial remedy for the cleanup of the site, pursuant to its authority under Section 104 of CERCLA, 42 U.S.C. § 9604. The central legal issue in this case involves the application of Section 113(h) of CERCLA, which Congress specifically enacted to foreclose challenges to ongoing removal or remedial actions selected under CERCLA, so that the EPA and the states could take prompt action to remedy dangerous conditions at Superfund sites unhampered by legal battles. *See* H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1 at 81; pt. 3 at 23 (1985).

A. CERCLA's Primary Goal Is To Promote the Cleanup of Hazardous Substances.

The primary purpose of CERCLA is the prompt cleanup of hazardous waste sites posing threats to the public health, welfare or the environment. *Alabama v. EPA*, 871 F.2d 1548, 1557-58 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989). Consistent with the goal of effectuating cleanup, Section 113(h) of CERCLA bars judicial review of any challenges to EPA-selected CERCLA removal or remedial response actions, except in five limited circumstances. *See* 42 U.S.C. § 9613(h). Section 113(h) does not contain any exception for RCRA citizen suits. Section 113(h)(4) does provide an exception for CERCLA citizen suit challenges, but only where plain-

tiffs challenge a *completed* response action. *See* 42 U.S.C. § 9613(h)(4). The express language of CERCLA provides that federal courts shall have no jurisdiction "to review *any challenges*" to a CERCLA-approved cleanup action, except in specifically listed circumstances not present in this case. *Id.* § 9613(h) (emphasis added).

B. The RCRA Regulation at Issue in This Case Is a Performance-Based Standard.

RCRA regulations require incinerators burning dioxin-containing wastes to meet certain "performance standards." *See* 40 C.F.R. § 264.343. The regulations at issue in this case require an incinerator burning dioxin-containing hazardous wastes to achieve a destruction and removal efficiency ("DRE") of 99.9999 percent (the "six 9s" requirement) on a designated surrogate constituent that is more difficult to incinerate than dioxin. *See id.* § 264.343(a)(2); *Arkansas Peace Center v. Arkansas Dep't of Pollution Control and Ecology*, 999 F.2d 1212, 1214 (8th Cir. 1993), Petitioners' Appendix (hereafter "Pet. App.") at 4a-5a. The regulations on their face require that the efficiency of the incinerator be tested using a harder-to-burn surrogate rather than dioxin itself. 40 C.F.R. § 264.343(a)(2).

The DRE calculation determines the incinerator's burning efficiency by comparing the mass of certain designated constituents put into the incinerator with the mass of those same constituents as they leave the incinerator stack. *Id.* § 264.343(a)(1). A DRE of 99.9999 percent, or a "six 9s DRE," means that the incinerator is operating at a level of efficiency where, for every million molecules of a designated constituent put into the incinerator, only one molecule is not destroyed. Section 264.343 therefore establishes a technology-based standard to measure the efficiency of an incinerator rather than setting substantive guidelines for what concentrations of dioxins can safely be emitted from the incinerator.

C. Incineration at the Vertac Site Constitutes an EPA-Approved CERCLA Response Action.

The Petition emphasizes the State's involvement in the incineration at the Vertac site. Petition at 10. However, the EPA has been actively involved at the Vertac Site ever since the Site was abandoned in 1987, with 28,000 corroding drums of hazardous waste left behind. When the Arkansas Department of Pollution Control and Ecology ("ADPC&E") contracted with VSC for the incineration of the drummed wastes, the EPA assisted the incineration efforts by maintaining the drummed waste, conducting off-site air monitoring, handling and transporting the drums for incineration, and disposing of the incinerator ash. Pet. App. at 4a. After the State had depleted the funds in the Vertac Site's litigation-created trust fund, EPA then contracted with VSC for the incineration of waste. Pet. App. at 9a.

D. The Proceedings Below.

Petitioners filed a complaint against VSC, ADPC&E and EPA on October 28, 1992, seeking preliminary and permanent injunctive relief to halt the incineration at the Vertac Superfund Site that the EPA had determined was necessary to avoid significant risks of exposure to the nearby population. EPA had also determined that the incinerator met all applicable RCRA regulations and concluded, based on empirical air monitoring data collected during incineration, that the incineration of wastes did not exceed any of EPA's health-based action levels for dioxin.[1] The petitioners' complaint raised a variety of federal and supplementary state claims, but focused on allegations that 40 C.F.R. § 264.343(a)(2) required

[1] The EPA has conducted continuous on-site and off-site ambient air monitoring at all times when the incinerator has operated. Pet. App. at 6a. The EPA prepared a risk assessment using that air monitoring data, and concluded that, "the excess probability of cancer associated with the incineration of dioxin was within the acceptable range." Pet. App. at 6a.

the incinerator to demonstrate a six 9s DRE on dioxin itself, rather than on the harder-to-burn surrogate principal organic hazardous constituent ("POHC") that the regulations required VSC to use in the trial burns.[2]

After an October 29, 1992 hearing, the district court entered a temporary restraining order enjoining VSC from incinerating some of the dioxin-containing wastes. Pet. App. at 16a-17a. After an additional hearing on the issue of whether the RCRA regulation at issue, Section 264.343, required VSC to test the efficiency of its incinerator using dioxin or a harder-to-burn surrogate, the district court issued an Amended Temporary Restraining Order. Pet. App. at 18a-19a. The February 16, 1993 Amended Temporary Restraining Order prohibited VSC from incinerating any of the wastes pending a scheduled March 4, 1993 preliminary injunction hearing. *Id.*

Like its prior temporary restraining orders, the district court's March 17, 1993 preliminary injunction order was based largely on its conclusion that Section 264.343 (a)(2) required the Vertac incinerator to demonstrate a six 9s DRE on dioxin itself, rather than on the harder-to-burn surrogate required by the regulations. The express language of the district court's order illustrates that the district court based its finding of potential irreparable harm on the premise that the incinerator had not met the regulatory requirements. *See, e.g.*, Pet. App. at 27a, 28a.

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[2] The Petition refers to an amended complaint as forming the basis of petitioners' claims. Petition at 11. However, petitioners did not even file the amended complaint until July 1, 1993, well after the oral arguments to the Eighth Circuit on the appeal of the preliminary injunction. Petitioners never obtained leave of court to file their amended complaint. *See* Fed. R. Civ. P. 15(a). While the amended complaint is similar to the original complaint, it added a diversity claim. Contrary to petitioners' statements, Petition at 11, the complaint at issue in this case does not allege diversity jurisdiction and that issue was never before the courts below.

On appeal of the preliminary injunction order, the Eighth Circuit held that the petitioners' claims, "although couched in terms of a RCRA violation, challenge a removal action" and therefore were barred under Section 113(h) of CERCLA. Pet. App. at 12a. The Eighth Circuit also held that, because the incineration was an EPA-approved CERCLA removal action, RCRA expressly barred the petitioners' RCRA citizen suit for imminent and substantial endangerment. Pet. App. at 13a-14a. *See* 42 U.S.C. § 6972(b)(2)(B)(ii).

The Eighth Circuit also concluded that, "if we were free to consider the merits of this appeal, we would entertain no doubt that the district court erred in its reading of 40 C.F.R. § 264.343." Pet. App. at 14a. The Eighth Circuit reached this result by relying on the express language of the regulation as well as the legislative history surrounding the regulation to conclude that EPA had specifically rejected the proposal to require trial burns on dioxin itself rather than on a harder-to-burn surrogate. *Id.* at 15a. Despite the petitioners' claims to the contrary, this case does not involve a situation where Section 113(h) has acted to protect activities in violation of the requirements of RCRA. *See* Petition at 10-11. Petitioners' assertion that the Eighth Circuit applied Section 113(h) to bar inquiry into an activity violating public health standards is therefore wrong. *See id.* at 14.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS ARE NOT IN CONFLICT OVER THE MEANING OF SECTION 113(h) OF CERCLA.

Petitioners try to create a conflict where none exists. Each case petitioners rely on to support their claim of lower court conflict is either distinguishable on its facts, or is misinterpreted by the petitioners.

The decision in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994) is clearly distinguishable from petitioners' claims here. *Colorado* involved a dispute between the United States and Colorado over whether Colorado could use its hazardous waste authority to clean up a portion of a site that the United States was cleaning up under CERCLA. The Tenth Circuit held that a state could maintain a RCRA citizen suit against the United States under 42 U.S.C. § 6972(a)(1)(A), despite the argument by the United States that Section 113(h) of CERCLA barred the claim. 990 F.2d at 1579. The Tenth Circuit went to great pains to distinguish such a state-instigated citizen suit from a private party citizen suit challenging a response action, holding that the express congressional intent behind Section 113(h) was to bar private party attempts to challenge CERCLA response actions, not to bar a state's effort to enforce its RCRA-delegated hazardous waste laws. *Id.* at 1576-77.[3]

Petitioners err in referring to *Alabama v. EPA*, 871 F.2d 1548, 1559 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989), as being in conflict with the Eighth Circuit's holding in this case. Petitioners wrongly assert that the court in *Alabama* reviewed certain claims "to the extent

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[3] The Eighth Circuit's decision in this case distinguished the *Colorado* decision for these same reasons. Pet. App. at 13a. Petitioners also filed their petition for certiorari prior to this Court's denial of certiorari in *Colorado*.

they were not solely a challenge to the response action for a Superfund site." *See* Petition at 18. The court did no such thing. In fact, the *Alabama* court held that Section 113(h) barred the plaintiffs' claims in their entirety because they all sought injunctive relief to stop an ongoing response action under CERCLA. 871 F.2d at 1560. None of the plaintiffs' claims escaped the jurisdictional bar of Section 113(h). The court only stated in *dicta* how it *would* hold on a limited issue *if* the plaintiffs' complaint were not jurisdictionally barred under Section 113(h). *Id.* at 1559.

The two other district court cases on which the petitioners rely are also readily distinguishable on their facts.[4] The purpose of Section 113(h) is to bar challenges to ongoing removal or remedial actions. 42 U.S.C. § 9613(h). However, the court in *Yslava v. Hughes Aircraft Co.*, Nos. 91-525-TUC-JMR, 92-564-TUC-JMR, slip op. at 10 (D. Ariz. Nov. 17, 1993), *reprinted in* 27 Chem. Waste Litig. Rep. 640 (1994), held that medical monitoring was not a CERCLA removal or remedial action and therefore concluded that plaintiffs' suit for medical monitoring fell outside the scope of Section 113(h). In other words, since the court determined that medical monitoring was not a CERCLA removal or remedial action, the court found that the plaintiffs could not be challenging an ongoing response action and thus did not apply Section 113(h). The *Yslava* court also noted that, even if medical monitoring were within the scope of Section 113(h), plaintiffs' claim for medical monitoring did not constitute a challenge to a CERCLA response action based on the facts involved and would therefore not be barred by Section 113(h). *Id.*

The decision in *Chemical Waste Mgmt., Inc. v. EPA*, 673 F. Supp. 1043, 1055 (D. Kan. 1987), is distinguishable because, unlike the case here, there was no ongoing

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[4] Even if these cases were not distinguishable, this isolated variation in lower court opinions is not sufficient to justify this Court's review of the matter.

CERCLA response action involved. For that reason, the court held that Section 113(h) was "facially inapplicable." *Id.* at 1055. In *Chemical Waste Mgmt.*, owners of a commercial hazardous waste incinerator sued the EPA to challenge a policy the EPA had applied to their incinerator. The incinerator was not located on a Superfund site subject to cleanup under CERCLA. Instead, the owners used the incinerator to incinerate waste sent to them by various parties across the nation. The determination that Section 113(h) did not bar the incinerator owners' challenge to EPA policy does not apply to the facts at issue here, where the petitioners without question challenged EPA action at a site where there was an ongoing removal action under CERCLA. *See Hanford Downwinders Coalition v. Dowdle*, Nos. CS-93-0245-AAM, CS-93-0290-AAM, 1993 WL 555970 at *9 n.3 (E.D. Wash. Dec. 23, 1993) (distinguishing *Chemical Waste Mgmt.* on same basis).[5]

Petitioners' attempt to create conflict with basically one circuit court decision is also repudiated by the overwhelming number of court decisions holding that the jurisdictional bar of Section 113(h) is far-reaching and bars any challenge, including those brought as RCRA citizen suits, to an ongoing response action.[6]

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[5] The constitutional challenge cases petitioners rely on to illustrate conflict are not applicable to this case since there are no constitutional claims at issue here. Each case is also distinguishable on its facts.

[6] *See North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991) (Section 113(h) barred RCRA and NEPA challenges to ongoing response action); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1024 (3d Cir. 1991) (Section 113(h) deprives district court of power to hear claims "under the [National Historic] Preservation Act, or any other statute that would interfere with EPA's clean-up activities on a Superfund site."); *Schalk v. Reilly*, 900 F.2d 1091, 1095, 1097 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990) (barred CERCLA citizen suit and NEPA claims challenging incineration of hazardous wastes since response action not yet com-

II. THE ISSUE BELOW WAS CORRECTLY DECIDED AND DOES NOT IMPLICATE AN IMPORTANT QUESTION OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

At the heart of petitioners' argument for why their petition should be granted is a disagreement with Congress' policy determination that the remedial goals of CERCLA should not be thwarted by challenges to ongoing cleanup activities. Petitioners' disagreement with the policies of CERCLA are more appropriately addressed to Congress than to this Court. Review is especially unwarranted in this case, where the Eighth Circuit determined that, if it were deciding the merits of the case, it would have concluded that Vertac complied with the applicable RCRA incineration regulations. *See* Pet. App. at 14a; *see also supra* at 6.

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plete); *Alabama*, 871 F.2d at 1557 (dismissed preliminary injunction granted in CERCLA citizen suit action which had enjoined EPA from implementing response action); *Hanford Downwinders*, 1993 WL 555970 at *12-*13 (rejected plaintiffs' argument that Section 113(h) should be read to bar challenges based on alleged monetary or property damages, but to not bar claims that are based on threats to human health); *Heart of America Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, 1279 (E.D. Wash. 1993) (barred RCRA citizen suit action contending state and federal defendants failed to properly report releases under RCRA and CERCLA); *Reynolds v. Lujan*, 785 F. Supp. 152, 153-54 (D.N.M. 1992) (barred RCRA citizen suit claiming that defendant landfill had disposed of waste in violation of RCRA provision and created an imminent and substantial endangerment); *Werlein v. United States*, 746 F. Supp. 887, 892-94 (D. Minn. 1990) (barred claims for injunctive relief under RCRA, CERCLA, Clean Water Act, a state counterpart statute and common law as challenges to an ongoing response action), *vacated in nonrelevant part*, 793 F. Supp. 898 (D. Minn. 1992); *Neighborhood Toxic Cleanup Emergency v. Reilly*, 716 F. Supp. 828, 834-35 (D.N.J. 1989) (barred CERCLA citizen suit).

A. Petitioners' Allegation That Their Claims Are Not Barred by Section 113(h) Is Flawed.

Petitioners argue that Section 113(h) does not bar their RCRA citizen suit claims because, while the RCRA citizen suit provisions expressly outline when they cannot be applied to CERCLA actions, the CERCLA citizen suit provisions and Section 113(h) never even mention RCRA. Petition at 22-24. Petitioners therefore conclude that the RCRA citizen suit provisions, which define the particular situations where RCRA citizen suits cannot be brought, are the only provisions which limit the ability of petitioners to bring a RCRA citizen suit. Petition at 24 n.6.[7]

Petitioners' interpretation of the applicability of Section 113(h) is flawed. The legislative history surrounding Section 113(h), as well as its express language, makes clear that Section 113(h) acts as a bar to claims other than those brought under CERCLA. The express language of Section 113(h) is broadly stated to bar "any challenge" to an ongoing CERCLA cleanup except for limited and defined exceptions. 42 U.S.C. § 9613(h). RCRA citizen suits are not one of the defined exceptions. Courts applying Section 113(h) have also uniformly rejected petitioners' argument, concluding that the jurisdictional bar of 113(h) bars RCRA citizen suit claims. *See, e.g., North Shore,* 930 F.2d at 1244; *Heart of*

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[7] The cases on which petitioners rely do not warrant a different result, nor do they support the need for review in this case. *Supporters to Oppose Pollution v. Heritage Group,* 973 F.2d 1320 (7th Cir. 1992), did not involve a situation where there was an ongoing removal or remedial action under CERCLA and therefore the case never considered the interaction between RCRA and Section 113(h). In *Lujan,* 785 F. Supp. at 154, the court did conclude that the provisions of RCRA independently precluded review in the case. However, it also held that Section 113(h) applied to bar the plaintiffs' RCRA challenges to the cleanup, confirming that Section 113(h) does not only bar challenges pursuant to CERCLA. *Id.*

America, 820 F. Supp. at 1282-84; *Lujan*, 785 F. Supp. at 153-54; *Werlein*, 746 F. Supp. at 892-94.[8]

B. Section 113(h) of CERCLA Protects the Important Public Policy of Preventing Delay in the Cleanup of Hazardous Substances.

Relying on legislative history, a number of courts have concluded that the limitations imposed by Section 113(h) on a district court's jurisdiction are an integral part of Congress' overall goal to prevent unnecessary delay in implementing hazardous waste cleanups. *See, e.g., Boarhead*, 923 F.2d at 1019; *Schalk*, 900 F.2d at 1095, 1097. These courts note that Congress balanced the right to immediate review against the overall goal of cleanup and decided on the side of prompt cleanup. Congress specifically acknowledged the very concerns petitioners raise here but rejected them:

> This is a valid argument and one which both neighbors of sites and potentially responsible parties have asserted. Neither of these persons want to see an inadequate or inappropriate remedy built. . . . Notwithstanding these arguments, the conferees decided to ensure expeditious cleanups by restricting such pre-implementation review.

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[8] Petitioners' assertion that their state claims and diversity claims are not subject to the jurisdictional bar of Section 113(h) is also wrong. As addressed previously, the diversity claims were not pleaded in the complaint at issue in this case and therefore were never in issue. *See supra* at 5 n.2. Petitioners similarly failed to raise to the Eighth Circuit the state law argument they now raise. In any event, state law, to the extent it challenges an ongoing response action pursuant to CERCLA, is considered an impermissible challenge under Section 113(h). *See Werlein*, 746 F. Supp. at 893 (holding that Section 113(h) "by its very terms states that the Court has no subject matter jurisdiction to hear 'any challenges under federal law . . . or under state law.' The fact that the statute states it applies to state law shows that Congress intended Section 9613(h) to extend beyond CERCLA.").

132 Cong. Rec. H9583 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman). Petitioners, despite this legislative history, simply wish that the balance had tipped in the other direction.

Congress therefore did recognize that the jurisdictional bar of Section 113(h) might lead to tradeoffs, but concluded that, in situations like the one here, where EPA determines there is an imminent and substantial endangerment requiring immediate action to protect the public, EPA must be free to take the necessary response action without interference. Courts have been sensitive to the potential tradeoff between prompt cleanup and immediate review, but, like the Eighth Circuit here, have consistently interpreted the law as Congress wrote it—to bar challenges to an EPA-approved response action until the cleanup is complete.

For example, *Boarhead* involved a site subject to a CERCLA response action which also contained an ancient American Indian burial ground. 923 F.2d at 1013. The plaintiff brought an action pursuant to the National Historic Preservation Act seeking to protect the Indian remains and artifacts on his property from the damage likely to occur during the cleanup of his property. *Id.* at 1013-14. The court held that Section 113(h) barred the plaintiff's claim, even though the court recognized that the absence of jurisdiction in *Boarhead* might do more than simply delay review, but instead might even "destroy or severely damage the site's historical value." *Id.* at 1021. Nevertheless, the court held that it lacked jurisdiction under Section 113(h) to review the plaintiff's claim until the response action had been concluded, noting that any relief to the plaintiff "must come from Congress." *Id.*

Similarly, in *Hanford Downwinders,* the court held that claims alleging a threat to human health were barred by the express provisions of Section 113(h). 1993 WL 555970 at *13. The court concluded that "[h]arsh as

this result may be, it is compelled by the severely restrictive language Congress has chosen to limit the jurisdiction of the federal courts. Remedy for this harm must be sought with Congress, who should by now be well aware of how the courts have unanimously interpreted section 113(h)." *Id. See also In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551, 1560-61 (E.D. Wash. 1991); *Werlein*, 746 F. Supp. at 894 (barring citizens' challenges to an ongoing CERCLA removal action under Section 113(h), court recognized congressional intent to prohibit such challenges until the completion of the cleanup, even though this application of Section 113(h) in part frustrated the purposes underlying the statutes on which plaintiffs based their claims).[9]

The case law confirms congressional intent to provide EPA with the ability to act quickly to stabilize those situations posing an imminent and substantial endangerment to the public. Such holdings do not eviscerate RCRA, but instead confirm the legislative purpose of protecting the public by enacting Section 113(h). Certainly, the case

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[9] The cases petitioners represent as evidencing concern about Section 113(h) precluding review are clearly distinguishable from this case. *See* Petition at 25. The *North Shore* court, while recognizing that in some instances Section 113(h) may practically preclude any effective review, declined to explore the outer bounds of Section 113(h). 930 F.2d at 1245. Similarly, the case of *Cabot Corp. v. EPA*, 677 F. Supp. 823 (E.D. Pa. 1988), involved only a suit for money damages brought by plaintiffs, which the court held was barred by Section 113(h). In *dicta*, the court did draw a distinction between claims for monetary damages and citizen suits alleging irreparable injury, but because the plaintiffs had no claim for irreparable injury, the court never actually analyzed the effect of Section 113(h) on an irreparable injury claim. *Id.* at 829-30. *See also Hanford Downwinders*, 1993 WL 555970 at *13 (distinguishing *Cabot Corp.* and noting that at least two courts have specifically addressed and rejected its dicta). Finally, as discussed previously, *Chemical Waste Mgmt.*, 673 F. Supp. 1043, is inapposite to the case at bar since it did not involve a situation where there was an ongoing response action under CERCLA.

at bar provides no reason to reject the balance adopted by Congress to effectuate prompt cleanup in light of the Eighth Circuit's conclusion that, if it were to look at this case on its merits, it would have held that VSC, EPA and ADPC&E properly interpreted and applied RCRA to the incineration of wastes at the site. Pet. App. at 14a. In any event, to the extent petitioners disagree with the policies and practical implications of Section 113(h), their remedy is with Congress and not with this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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